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No. 93-496

In the Supreme Court of the United States

OCTOBER TERM, 1993

IRVING C. AND JEANNETTE STEVENS,

Petitioners,

v.

THE CITY OF CANNON BEACH and STATE OF OREGON, by and through its Department of Parks and Recreation,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF FOR RESPONDENT STATE OF OREGON, DEPARTMENT OF PARKS AND RECREATION

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QUESTION PRESENTED

Has plaintiffs' property been "taken" requiring payment of compensation when the state court, applying legal principles that have been part of the state's property law since statehood, concludes that plaintiffs' inability to develop their property is based on the public's acquisition of an easement that pre-dated plaintiffs' purchase of the property?

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INTRODUCTION

Plaintiffs' petition for certiorari fails to raise an important question of federal law meriting this Court's discretionary review. The first and third questions they present were neither raised before nor addressed by the Oregon Supreme Court and necessarily are not reviewable for the first time by this Court. Plaintiffs' second question, which respondent has recast, does not merit review because it is largely based on state law considerations which the Oregon court correctly resolved against plaintiffs. Most important, however, the lower court resolved plaintiffs' total takings claims on grounds which plaintiffs do not challenge here. For this Court to review the only federal question actually presented, or even to review the questions not presented below, would be a waste of this Court's discretionary review

authority because the lower court's judgment affirming dismissal of plaintiffs' takings complaint could not be disturbed.

STATEMENT OF THE CASE

The Oregon Supreme Court affirmed the trial court's dismissal of plaintiffs' complaint, which was based on motions to dismiss filed by the State and the City of Cannon Beach pursuant to Or. R. Civil P. 21(A)(8) (failure to state ultimate facts sufficient to constitute claims). *Stevens v. City of Cannon Beach*, 317 Or. 131, 135, 854 P.2d 449 (1993) (Pet. App. A4). The facts, then, for purposes of resolving the questions presented, are those set forth in plaintiffs' amended complaint, Resp. App. 1–9, rather than, as plaintiffs state, the "facts" set forth in their briefs before the Oregon appellate courts. Their briefs contained many "facts" that were not set forth in their amended complaint, that were not properly before the State courts for review, and that were not considered on appeal.

I. Statement of Facts

Plaintiffs own oceanfront property in the City of Cannon Beach. Amended Complaint ¶ 1 at App-1. The property is zoned for residential/motel use. However, most of it also is subject to an "overlay zone," adopted by the City of Cannon Beach which prohibits the construction of residential, commercial or industrial buildings. The overlay zone was enacted to implement statewide land use planning Goal 18, adopted by the State Land Conservation and Development Commission ("LCDC"), regulating land use on Oregon's beaches and dunes. LCDC Goal 18 also precludes the construction of residential developments and commercial or industrial buildings on beaches, active foredunes and other unstable areas of the Oregon coast. *Id.* ¶¶ 5, 10 at App-2, App-3.

A substantial portion of plaintiffs' property lies on the "dry sand area" of the beach and is seaward of the "zone line" established by the State's Beach Bill. *Id.* ¶ 29 at App-6; Exhibit 1 to Complaint at 3; Exhibit 2 to Complaint at 1. That law requires a permit prior to any development of such land. Or. Rev. Stat. § 390.650.

Plaintiffs want to develop their oceanfront property. They wish to construct a seawall on the dry sand area, backfill that property behind the new wall and construct a hotel on the site. Amended Complaint ¶ 14 at App-3; Exhibit 2 to Complaint at 7. Because of the location of the property, plaintiffs were required to obtain several permits to construct the seawall: one from the City of Cannon Beach because of the overlay zone; one from the Oregon State Parks and Recreation Department ("department") pursuant to the Beach Bill; and one from the Oregon Division of State Lands, for permission to fill and remove coastal lands. Plaintiffs submitted permit applications to all three agencies. Amended Complaint ¶¶ 14, 30 at App-3, App-6; Exhibit 2 to Complaint at 8.

The City of Cannon Beach denied plaintiffs' application. *Id.* ¶ 14 at App-3. After reviewing plaintiffs' application materials, the City concluded that plaintiffs had failed to satisfy a number of policies and conditions set forth in the City's comprehensive plan and zoning ordinance. For example, in its findings of facts and conclusions, the City found that the application was inconsistent with the City's flood hazard policy; that it was inconsistent with the City's policies and ordinances prohibiting commercial development on the beach; that plaintiffs provided no evidence of the necessity of constructing such a seawall to control erosion, as is required; that plaintiffs failed to provide evidence that their proposed project would preserve required public access to the

beach, or that visual impacts would be minimized, or that riparian vegetation would be preserved. *See generally* Exhibit 1 to Complaint.

The Parks and Recreation Department denied plaintiffs' application as well. Amended Complaint ¶ 31 at App-6. The department's denial, like that of the City, was based on plaintiffs' failure to comply with a number of permit requirements set out ~~in the applicable law~~ and regulations. In particular, the department found that the proposed seawall posed a safety threat to the public and the environment by increasing the threat of erosion and precluding safe escape from the beach in the event of high or storm tides. The department also noted that the proposed project would result in the loss of approximately 12,500 square feet of dry sand beach, to which the public currently has lawful access. The department concluded that plaintiffs failed to address how this right of public recreational use would be mitigated. *See generally* Exhibit 2 to Complaint.

The department further concluded that the proposed project would not comply with other applicable state and local laws. In particular, the department found that plaintiffs had failed to obtain the necessary approval of the local zoning authority (the City of Cannon Beach) and the approval of the Division of State Lands. The department also noted that plaintiffs' ultimate objective — construction of a hotel on the beach — was inconsistent with LCDC Goal 18. *Id.* at 6–8.

Finally, the Director of the Division of State Lands denied plaintiffs' permit application to that agency. *Id.*

Plaintiffs did not appeal the City's decision. Nor did they pursue the next step in the administrative process for challenging the decision of the Division of State Lands — namely, a request for a contested case hearing under the State's Administrative

Procedure Act, Or. Rev. Stat. §§ 183.413 – 183.497. Instead, plaintiffs filed this action for damages in Clatsop County Circuit Court.

II. Procedural History

Respondent sets out the procedural history in some detail because it demonstrates that plaintiffs did not raise in their complaint or on appeal two of the three federal questions they assert that this case presents.

Plaintiffs' complaint included five claims: two against the City of Cannon Beach and three against the State. In their first claim, they alleged that the City's decision, as applied to their property, caused the property to have no economically beneficial use and effected an unconstitutional taking. Amended Complaint ¶¶ 1–21 at App-1 – App-5. In their second claim, they alleged that the City's overlay zone resulted in an unconstitutional taking because, on its face, it deprived them of all economically beneficial use of their land. *Id.* ¶¶ 22–27 at App-5 – App-6. In their third claim, plaintiffs alleged that the department's decision to deny their application effected an "as applied" taking. *Id.* ¶¶ 38–36. In their fourth claim, they alleged that LCDC Goal 18, on its face, was a taking of their property. *Id.* ¶¶ 37–41 at App-8. Finally, in their fifth claim, plaintiffs asked for judicial review of the Parks and Recreation Department's denial of their application to build a seawall and prayed for damages and attorney fees on that claim. *Id.* ¶¶ 42–43 at App-8 – App-9.

The City and the State moved to dismiss the four takings claims, based on the Oregon Supreme Court's decision in *State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P.2d 671 (1969). In a nutshell, defendants argued that, in light of *Thornton*, denying a permit to build a seawall or a hotel on the beach cannot be a taking of property, even if doing so does precludes the owner

from using the property for any economically beneficial use. In *Thornton*, the Oregon Supreme Court held that dry sand property owners do not have a proprietary interest that enables them to erect structures that would exclude the public from the dry sand areas of the beach. The Oregon court applied the common law doctrine of custom and held that the public, as a result of long, continuous use of the dry sand portion of Oregon's beaches, had acquired a recreational easement on the dry sand, a right with which private property owners could not interfere.

Both defendants also moved to dismiss the four takings claims on other grounds. They argued that the facial takings claims could not be maintained because on the face of the challenged regulations, both the overlay zone and LCDC Goal 18 do not preclude all use of private property. They also argued that the "as applied" takings claims could not be brought because plaintiffs had failed to satisfy the non-constitutional bases for the permit denials and because plaintiffs failed to exhaust available administrative remedies. In addition, the State moved to strike the request for damages and attorney fees from the judicial review claims. *Id.*

The trial court granted defendants' motions to dismiss, based on the *Thornton* decision. It also granted the State's motion to strike. The court did not address the other motions, as its decision operated to dismiss all of the takings claims. When plaintiffs voluntarily dismissed their claim for judicial review of the department's permit denial, the court entered judgment in favor of defendants on the claims that remained.

Plaintiffs appealed the trial court's decision to the Oregon Court of Appeals. In their opening brief, plaintiffs set forth two assignments of error:[1]

> Assignment of Error no. 1: The lower court erred in holding that *State ex rel Thornton v. Hay* eradicated private owners' rights to any development of their "dry-sand" portion of the beach.
>
> Assignment of Error no. 2: The lower court erred in not ruling on all of defendants' motions to dismiss, and in the interest of judicial economy, this court should rule on those motions.

Pet. App. G74.[2]

Plaintiffs summarized their argument addressed to the *Thornton* decision with the following four points:

> (A) *Thornton* determined that the State could enjoin the construction of a fence built on the "dry sand," not built in accordance with ORS 390.650. It did not declare that no structure could ever be built on the "dry-sand" area of Cannon Beach.
>
> (B) To construe *Thornton* as preventing all economic development by the private owner of the "dry-sand" portion of Cannon Beach, results in an implied repeal of the Beach Bill (ORS 390.605, *et seq.*; a result no [*sic*]

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[1] Assignments of error are required under Oregon state appellate practice. Or. R. App. Proc. 5.45(1). To consider a matter on appeal, the matter must not only have been preserved in the lower court but also assigned as error on appeal. *Id.* 5.45(2).

[2] In their appendix at G60–132, plaintiffs set forth the argument from their Court of Appeals opening brief relating only to their first assignment of error. The argument in support of their second assignment of error is set out at pages 39–47 of their opening brief. Plaintiffs' second assignment of error was directed to the State's and City's alternative motions to dismiss, which were independent of the *Thornton* decision.

understood, let alone argued for, by anyone until this case.

(C) *Thornton* is not *res judicata* as to plaintiffs, and they have the right to show that the doctrine of ancient custom is not applicable to their land.

(D) If *Thornton* is construed to prevent all economic development of private property consisting of "dry sand," it constitutes an unconstitutional taking of plaintiffs' property.

Pet. App. G78-79. Thus, parts (A) and (B) of plaintiffs' argument were that the trial court misinterpreted the *Thornton* decision. In part (C), plaintiffs argued that because they were not parties before the court in *Thornton*, their property rights could not be determined by that case, so they proceeded to discuss why the doctrine of custom found to apply in that case should not apply to their property.[3] In part (D), plaintiffs argued that after the decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Thornton* could not be sustained because *Nollan* recognized that the right to exclude persons from property is a

[3] Plaintiffs argued:

The *Thornton* court paraphrased the seven elements of ancient custom, as set forth in Blackstone's, *Commentaries* (1765-1769), as follows: (1) Antiquity; (2) An exercise of use without interruption; (3 Peaceable use; (4) Reasonable use; (5) Certainty as to the land in question; (6) Use as a matter of right; and (7) Consistency with other custom or law.

Of these elements, the first: *antiquity*; the second: *an exercise of use without interruption*; the fourth: *reasonable use*; the sixth: *use as a matter of right*; and the seventh: *consistency with other custom or law*, are each of doubtful applicability in this case, and were of doubtful application to the property before the *Thornton* court. They shall be analyzed in order.

Pet. App. G 94.

property interest that the State may not take from the owner without paying compensation. Pet. App. G118-32.

The State and City answered each of plaintiffs' arguments. The State argued that the trial court properly interpreted *Thornton* as holding that private owners of dry sand on the beach have no property interest that entitles them to exclude the public from exercising its recreational easement over the dry sand. The State further argued that there could be no question but that, based on the *Thornton* decision itself as well as a recent Oregon Supreme Court decision,[4] *Thornton* applied to plaintiffs' property: plaintiffs' property was not only also located in Cannon Beach but was directly adjacent to the very property considered in *Thornton*. Finally, the State argued that *Thornton* did not constitute a taking of plaintiffs' property, because for a taking to occur there has to be some property interest being taken. Given *Thornton*'s holding that the public possessed a recreational easement over the dry sand, the denial of any development that would interfere with the public's easement could take no property interest, and no compensation therefore was due.

The State set forth a separate grounds for upholding the trial court's judgment dismissing plaintiffs' amended complaint. The State argued that even if the trial court were wrong in relying on *Thornton*, independent grounds supported the judgment. The State asserted that LCDC Goal 18 is constitutional on its face and does not, as applied, "take" plaintiffs' property because the goal in fact permits other economically beneficial uses of plaintiffs' property. Plaintiffs' takings challenge directed to the department's denial of their permit was not ripe because plaintiffs had failed to exhaust available administrative review remedies. Also,

[4] *McDonald v. Halvorson*, 308 Or. 340, 780 P.2d 714 (1989).

that claim was premature because the denial was based in part on plaintiffs' failure to comply with several permit requirements that were lawful and that plaintiffs did not challenge. Plaintiffs filed a reply brief in which they attempted to refute the alternative and independent grounds the State had asserted for upholding the trial court's dismissal of their amended complaint.

The court of appeals concluded that *Thornton* was controlling and, thus, affirmed the trial court's dismissal of plaintiffs' takings claims. *Stevens v. City of Cannon Beach*, 114 Or. App. 457, 459, 835 P.2d 940 (1992) (Pet. App. B19-21).[5] The court stated that "under the Supreme Court's decision in *Hay*, plaintiffs have never had the property interests that they claim were taken by defendants' decisions and regulations."[6] Pet. Cert. App. A21. The court then concluded that the decision in *Thornton* did not effect a taking under *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886 (1992). The court reasoned that *Thornton* "is an expression of state law that the purportedly taken property interest was not part of plaintiffs' estate to begin with." Pet. Cert. App. B21. Recognizing that *Lucas* disavowed any notion that a taking occurs where "proscribed use interests were not part of [the landowner's] title to begin with," 112 S.Ct. 2899, the court of appeals held that "there was no taking within the meaning of the Oregon or United States Constitutions." Pet. Cert. App. B21.

On review in the Oregon Supreme Court, plaintiffs did not urge that *Thornton* was wrongly decided and should be overruled. To the contrary, they expressly conceded that they were not

[5] Plaintiffs' appendix inadvertently omits page 459 from the Court of Appeals decision.

[6] The Court of Appeals' opinion refers to the *Thornton* decision as *Hay*.

making that argument. Pet. Cert. App. I200. They limited themselves to two arguments. First, they argued that the lower courts had unjustifiably interpreted *Thornton* as prohibiting *all* development on the dry sand area. Such a conclusion conflicted with *Lucas*, they argued, because takings of the type described in *Nollan* could be accomplished by court decree, and the doctrine announced in *Thornton*, as interpreted by the lower courts, did not exist when they purchased their property. Plaintiffs asked for a much more limited interpretation: that *Thornton* merely held that the State has the power reasonably to limit construction on the dry sand portion pursuant to the Oregon Beach Bill (Or. Rev. Stat. §§ 390.605 - 390.690, Pet. App. E34), but not to deprive an owner of all economic use of the land. Pet. Cert. App. H147-54.

Second, plaintiffs contended that *Thornton* was not decided until 1969, twelve years after they acquired their ocean front property, and that to apply *Thornton*'s "new principal [sic] of law" to their property, decided *"ipse dixit"* by the court, would constitute an impermissible retroactive application of a legal pronouncement. Pet. Cert. App. H154-168.[7]

The Oregon Supreme Court affirmed the court of appeals. Pet. Cert. App. A1. First, the court observed that plaintiffs had not asked it to overrule *Thornton* or to have the Beach Bill declared unconstitutional. The court's opinion then evolved into two parts. The first discussed *Thornton* and explained why the decision, as correctly interpreted by the court of appeals, did not effect a taking of plaintiffs' property under *Lucas*. The second

[7] Plaintiffs pressed other arguments as well, Pet. App. H169-176, but these arguments, to the extent they differed from ones previously raised, dealt only with purely state law issues.

addressed plaintiffs' claim that LCDC Goal 18, as applied through the City's ordinance and the department's regulations, deprives plaintiffs of all economically beneficial use of their property.

The court concluded the first portion of its opinion by stating:

> Applying the *Lucas* analysis to this case, we conclude that the common-law doctrine of custom as applied to Oregon's ocean shores in *Thornton* is not "newly legislated or decreed"; to the contrary, to use the words of the *Lucas* court, it "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership." *Id.* at 821. As noted in *Hay v. Bruno*, *supra*, 344 F Supp at 289, "there was no sudden change in either the law or the policy of the State of Oregon. For at least 80 years, the State as a matter of right claimed an interest in the disputed land." Plaintiffs' argument that a "retroactive" application of the *Thornton* rule to their property is unconstitutional, is not persuasive. *Thornton* did not create a new rule of law and apply it retroactively to the land at issue in that case, *Hay v. Bruno*, *supra*; nor did *Thornton* create a new rule of law applied to plaintiffs' land here. *Thornton* merely enunciated one of Oregon's "background principles of * * * the law of property." *Lucas*, *supra*, 120 L Ed 2d at 832. We therefore agree with the Court of Appeals, which concluded that the trial court's reading and application of *Thornton* were correct. 114 Or App at 459.
>
> When plaintiffs took title to their land, they were on notice that exclusive use of the dry sand areas was not a part of the "bundle of rights" that they acquired, because public use of dry sand areas "is so notorious that notice of the custom on the part of persons buying land along the shore must be presumed." *Thornton*, *supra*, 254 Or at 598. *See also State Highway v. Fultz*, *supra*, 261 Or at 289 (public use has existed since 1889). We, therefore, hold that the doctrine of custom as applied to public use of Oregon's dry sand areas is one of "the restrictions that background principles of the State's law of property * * * already place upon land ownership." *Lucas*, *supra*, 120 L. Ed 2d at 821. We hold that plaintiffs have never had the property interests that they claim were taken by defendants' decision and regulations.

Pet. Cert. App. A11-12.

The court's conclusion that, under *Thornton*, plaintiffs had no property interest that had been "taken" by the denial of their seawall permit disposed of their takings claim. Nevertheless the court also concluded that plaintiffs had failed to demonstrate that LCDC Goal 18's application to their property deprived them of all economically beneficial use of their property. The court rejected plaintiffs' facial attack on the goal, stating:

> It is clear from LCDC Goal 18, however, as well as from the regulations and ordinances at issue here, that what is prohibited is "residential developments and commercial and industrial buildings." Not all economically viable uses of plaintiffs' property falls [sic] within that prohibition. . . .
>
> . . . Because LCDC Goal 18 makes provisions for certain economically viable uses of private beaches and dunes, we conclude that city's ordinances and department's administrative rules implementing that goal do not constitute a facial taking of private property.

Pet. Cert. App. A16.

The court similarly rejected plaintiffs' "as applied" claim. First, the court refused to analyze plaintiffs' claim as though the City and department had denied them a permit to build a motel or hotel on the property; plaintiffs had applied only for a seawall construction permit. Second, it was clear that at least in some circumstances, LCDC Goal 18 permitted seawalls to be con-

structed, and plaintiffs had not shown that they would be unable to build one under any circumstance. Had plaintiffs been able to satisfy several of the City's criteria, compliance with which was not impossible based on LCDC Goal 18, it was "far from clear" that doing so "would not have resulted in city's approval of plaintiffs' conditional use permit to build a seawall." Pet. Cert. App. A18.

As to the department's denial of the seawall permit, the court noted that the denial based on LCDC Goal 18 had been premised on an erroneous finding of fact that plaintiffs, had they pursued their available administrative remedies, could have cured:

> The state's denial of the permits to build the seawall was premised on its findings that plaintiffs failed to meet the criteria set forth in OAR 736-20-005 through OAR 736-20-025. Only OAR 736-20-010(6) pertains to the requirements of LCDC Goal 18. In its finding pertaining to this subsection, however, the state erroneously found that no development existed on these lots before January 1, 1977. Complaint, Exhibit 2, at 9. This finding conflicts with city's finding in this regard, as well as the facts as stated in plaintiffs' complaint, which we take as true for purposes of this review. The lots in question were "developed" under the definition provided in LCDC Goal 18 Implementation Requirement 5, because they were "vacant subdivision lots which are physically improved through construction of streets and provision of utilities[.]" We conclude that the state's finding was erroneous, but we are unable to conclude that the error was the reason for denial of the permit in the present case or that compliance with "technical objections" would have been futile.
>
> Had plaintiffs pursued the remedy available for review of department's decision, that error could have been addressed. ORS 390.658. Plaintiffs, however, chose to dismiss their claim under that statute. The fact that review of this issue would have been available under ORS 390.658 certainly undermines plaintiffs' claim that pursuit of other remedies would have been futile.

Pet. Cert. App. A18, n.16.

The Oregon Supreme Court concluded its analysis of plaintiffs' takings claims as follows:

> Because the administrative rules and ordinances here do not deny to dry sand area owners all economically viable use of their land and because "the proscribed use interests" asserted by plaintiffs were not part of plaintiffs' title to begin with, they withstand plaintiffs' facial challenge to their validity under the takings clause of the Fifth Amendment. *Lucas*, *supra*, 120 L Ed2d at 820. Moreover, because it is clear that, under the challenged ordinances and regulations, a seawall could be built on plaintiffs' land if the other criteria, not challenged in this case, were met, those sources of law withstand an "as applied" challenge in the present case. We hold that there was no taking of plaintiffs' property within the meaning of the Fifth Amendment. *Lucas*, *supra*.

Pet. Cert. App. A18a.

ARGUMENT

Plaintiffs' challenge is directed solely to the State courts' interpretation of *State ex rel. Thornton v. Hay*, supra, and its application to this case. Most of the arguments that they direct to that issue were not raised before nor discussed by the Oregon Supreme Court and should not be considered by this Court.

More important, however, plaintiffs' total takings claim was rejected by the Oregon Supreme Court on grounds independent of the *Thornton* decision. Plaintiffs do not challenge those independent grounds in their petition for writ of certiorari. The Oregon court concluded that plaintiffs had failed to allege facts sufficient to demonstrate that LCDC Goal 18, which bans much

development on the dry sand portion of Oregon's beaches, denies plaintiffs all economically viable use of their property. At most, then, the holding of the Oregon Supreme Court is that while *Thornton* recognizes a public recreational easement over plaintiffs' property, plaintiffs continue under the Beach Bill and LCDC Goal 18 to have some economically viable use of their property. If the Oregon Supreme Court was wrong in its application of *Thornton* to this case, at most plaintiffs have been deprived of one of their property interests — the right to exclusive possession — but they have not been deprived of all economically viable use of their property.

Plaintiffs' complaint, however, did not allege a partial taking of their property, as the property owners had alleged in *Nollan*. Plaintiffs' claim here was that LCDC Goal 18, as applied by the City and the department, deprived them of all economically beneficial use of their property. The question whether *Thornton* improperly takes away from plaintiffs only one of their property interests is irrelevant under their total takings claim. Necessarily, then, even if this Court were to grant certiorari in this case and ultimately agree with plaintiffs' analysis of *Thornton*, that would not disturb the lower courts' dismissal of plaintiffs' total takings claim. Viewed in this context, the question of *Thornton*'s correctness is purely an abstract question. The petition for certiorari should be denied.

I. The Oregon Supreme Court's affirmance of the dismissal of plaintiffs' complaint rests on independent grounds which plaintiffs do not challenge here.

Plaintiffs' amended complaint alleged that the City's and the department's denials of their permit to build a seawall on the dry sand portion of their property deprived them of all economically viable use of their property. The gravamen of their claim was

directed to Oregon's Statewide Planning Goal 18, adopted in 1985, which they alleged "require[s] local governments and state and federal agencies to prohibit residential developments and commercial and industrial buildings on beaches." LCDC Goal 18's prohibition on commercial, industrial and residential development, they asserted, deprived them of all economically beneficial use of their property, both on its face and as applied to their property.

The department and the city defended this attack on two fronts. First, they argued that LCDC Goal 18, in denying commercial, residential and industrial development that would have the effect of interfering with the public's recreational use of the dry sand, did not deprive dry sand property owners of any property interest, given the decision in *State ex rel. Thornton v. Hay*, *supra*. In that decision, the Oregon Supreme Court applied the state law doctrine of custom and concluded that the public, through long, continuous use of the dry sand portion of Oregon's beaches, had acquired a recreational easement with which the dry sand owner could not interfere by erecting fences or other obstacles. Necessarily, a seawall, or any other commercial, residential or industrial development on the dry sand, would interfere with the public's recreational easement on the dry sand. Accordingly, to the extent LCDC Goal 18 prohibited such developments, it deprived dry sand owners such as plaintiffs of no property interest, and could not, therefore, constitute a taking of their property.

Second, however, the department and the city argued that independent of *Thornton*, LCDC Goal 18 did not deprive dry sand owners of all economically beneficial use of their property, either on its face or as applied. Therefore, even if *Thornton* were wrongly decided or did not apply to plaintiffs' property, LCDC

Goal 18 allowed plaintiffs economically beneficial use of their property and no total takings claim had been adequately alleged.

The Oregon Supreme Court agreed with the department and the City on both points. It concluded that LCDC Goal 18 did not deprive plaintiffs of a property interest, because, under *Thornton*, and as a matter of state property law, plaintiffs had no development rights in the dry sand portion of their property that could interfere with the public's custom-based recreational easement over the dry sand. The court further held that LCDC Goal 18 did not deprive plaintiffs of all economically beneficial use of their property in any event.

To grant certiorari, this Court requires the presence of an important question of federal law. Sup. Ct. Rule 10.1. Here, the lower court's decision rests on two independent grounds, both potentially involving federal questions. Petitioners claim, however, is directed to only one of the grounds for the decision.

Plaintiffs here do not challenge the other ground. While a federal question could be raised as to whether the Oregon court's conclusion that LCDC Goal 18, independent of its *Thornton* moorings, either on its face or as applied, deprives plaintiffs of all economically viable use of their property, plaintiffs do not present that question in their petition. The only question they raise relates to the correctness of the Oregon court's application of the *Thornton*-articulated doctrine of custom to their property.

This Court's resolution of the limited federal question presented therefore will not affect the validity of the result the lower court reached and, hence, will afford the plaintiffs no relief. Regardless of how interesting the federal question actually presented may be, it is merely an abstract question because its resolution has no practical effect on the decision below. For that

reason, plaintiffs' petition fails to raise an important federal question, and the petition should be denied.[8]

II. The validity or applicability of *Thornton* to plaintiffs' property, even if plaintiffs' had made a partial takings claim, does not present a substantial federal question meriting this Court's review.

Plaintiffs assert that this case "for the first time, presented to the Oregon high court three direct challenges to the present day validity of *Thornton*." Pet. Cert. 12. Two of those challenges — that *Thornton* constitutes a collateral attack on the federal patent conveying their property to their predecessors in interest (first "challenge"), and applying *Thornton* to their property deprives them of due process and equal protection (third "challenge") — never were presented to or addressed by the Oregon Supreme Court. Only plaintiffs' second "challenge" — i.e., that *Thornton*'s announced property law principle that the public could acquire a recreational easement by custom was not, pre-*Thornton*, part of the state's background principles of property law within the meaning of *Lucas* — was raised before and decided by the Oregon Supreme Court.

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[8] If plaintiffs' complaint had included a claim such as that presented in *Nollan i.e.*, that a valuable property interest, the right to exclusive possession, had been taken from them, the Oregon court's resolution of *Thornton* would have some practical consequence. If a partial takings claim had been made, and the department and the City had defended that claim on the basis that plaintiffs had no property-based right to exclude the public based on *Thornton*, then plaintiffs would have a basis for arguing that the Oregon court's decision addressing *Thornton* had some practical consequence, even though the Oregon court had on other grounds affirmed the dismissal of plaintiffs' total takings claim. But plaintiffs' complaint included only total takings claims. Given that the Oregon court affirmed the dismissal of these claims on grounds independent of *Thornton*, and given that plaintiffs do not challenge those independent grounds, *Thornton's* importance as a federal question evaporates.

Plaintiffs' second question can be broken into two parts, the first of which is essentially a state law question and the second of which is a federal law question. The state law part of the question consists of two subparts: (1) whether Oregon's property law, prior to *Thornton*, contained a principle that the public could acquire a recreational easement under the common law doctrine of custom; if so, (2) whether *Thornton* correctly concluded that the requirements for such an easement had been satisfied. The Oregon court resolved these fundamentally state-law questions in the affirmative, and no basis exists for this Court to disturb the lower court's holding.

The second part of plaintiffs' question presents the federal law question of whether the Oregon court's holdings satisfy *Lucas* and, therefore result in no taking requiring compensation. This part also consists of two subparts: (1) whether the doctrine of custom satisfies *Lucas*' holding that limitations on use of property grounded in state property law principles do not result in takings; and (2) whether the public recreational easement recognized in *Thornton* satisfies Lucas' statement that where a physical occupation of land is based on a "permanent easement that was a preexisting limitation upon the landowner's title," no taking requiring compensation results. 112 S.Ct. at 2900.

Contrary to plaintiffs' arguments, the Oregon Supreme Court properly determined that the doctrine of custom was a background legal principle in Oregon within the meaning of *Lucas*, and that the public recreational easement was a preexisting limitation on the plaintiffs' property that defeated their takings claims. The lower court's resolution of those questions is unremarkable, in light of *Lucas*' clear guidance. Moreover, inasmuch as few States appear to adhere to the doctrine of custom, and plaintiffs are able to cite no decisions of other courts

that are in conflict with the analysis the lower court followed or the result that it reached, this Court's review would largely be error correcting in nature. No important federal question is presented under these circumstances that warrants the exercise of the Court's discretionary jurisdiction.

A. Plaintiffs' first and third challenges were not raised before nor decided by the Oregon Supreme Court.

It is virtually axiomatic that this Court will not consider a question to meet the "substantial federal question" requirement necessary to invoke this Court's jurisdiction when the question was not properly raised in the state court proceedings. *Illinois v. Gates*, 462 U.S. 213, 218–20 (1983); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). This doctrinal limitation on the exercise of jurisdiction applies to the first and third questions plaintiffs ask this Court to review.

1. Whether, as matter of federal law, *Thornton* is a collateral attack on the issuance of federal patents was not presented below. In any event, plaintiffs' argument is based on a misreading of *Thornton*.

Plaintiffs' first argument in support of granting certiorari is that the *Thornton* decision "is, necessarily, a collateral attack upon the original 1893 patent granted petitioners' predecessor in title." Pet. Cert. 14. Plaintiffs argue that *Thornton* declared the existence of a public recreational servitude on their property that predated the issuance of federal patents to their predecessor in title in 1893. Under *Summa Corporation Ltd. v. California ex rel. State Lands Commission*, 466 U.S. 198 (1984), which plaintiffs assert the court below "ignored," (Pet. Cert. 17), the issuance of a federal patent bars all inchoate, unrecorded claims not presented and resolved in the patent proceedings. The public recreational servitude is, in petitioners' view, such an inchoate, unrecorded claim. Thus, they argue, the *Thornton* decision, as

applied in this case, "stand[s] in stark contrast to the controlling federal law of title and property rights to littoral land enunciated by this Court in a line of cases stretching . . . to *Summa Corporation v. California, supra*, decided in 1984." Pet. Cert. 20.

Conspicuously absent from plaintiffs' petition for review filed in the Oregon Supreme Court was any reference to any of the "line of cases," including *Summa Corporation*, to which they now refer in their petition for certiorari, or any argument that remotely resembles the patent argument they advance in their certiorari petition. Aside from a brief discussion at oral argument in the Oregon Supreme Court alluding to the effect of patents issued in 1893, (Pet. Cert. App. I195-97) plaintiffs' only reference to the subject of patents was made in their court of appeals brief.

In the court of appeals, however, plaintiffs did not argue that as a matter of federal law *Thornton* should be overruled or limited based on the title their predecessor obtained by patent in 1893. Rather, plaintiffs' patent discussion was made in an attempt to convince the court of appeals that the "antiquity" element of the doctrine of custom had not been satisfied as to their property. Pet. Cert. App. G95-107. As so raised, plaintiffs' argument was a state law issue — did their property properly fit within the state law doctrine of custom? They specifically did not argue that if the court found that their property did fit the doctrine, that the court nevertheless should not apply it because to do so would infringe on the federal patent rights their predecessor in interest had acquired.

Plaintiffs' argument to this Court, in any event, is based on a misreading of what *Thornton* and the courts below in the present case actually held. Neither *Thornton* nor the courts below

concluded that the public's recreational easement had come into being prior to issuance of federal patents in 1893. Rather, what was in existence at that time, and had been since before Oregon's statehood was achieved in 1859, was the common law *principle* that public easement rights could be acquired under the doctrine of custom. While the *Thornton* decision recognized that the public had enjoyed the dry sand area of Oregon's beaches "since the beginning of the state's political history," 254 Or. at 588, the court did not conclude that a public easement had been acquired prior to 1893. In the present case, the Oregon Supreme Court also did not pinpoint the date the public easement came into being, but only noted that

> [w]hen plaintiffs took title to their land, they were on notice that exclusive use of the dry sand areas was not a part of the "bundle of rights" that they acquired, because public use of dry sand areas "is so notorious that notice of the custom on the part of persons buying land along the shore must be presumed." *Thornton, supra*, 254 Or at 598. *See also State Highway v. Fultz, supra*, 261 Or at 289 [491 P.2d 1171 (1971)] (public use has existed since 1889). . . .

Pet. Cert. App. A12.

To the extent, then, that plaintiffs' patent infringement argument rests on the assumption that *Thornton* had held that a public recreational easement on the dry sand of Oregon's beaches pre-dated 1893, it is factually erroneous.

B. Whether the decision in *Thornton* or its application in the present case deprives plaintiffs of due process or equal protection was neither raised before nor addressed by the Oregon Supreme Court.

Plaintiffs' third argument in support of certiorari is that as applied to them, the doctrine of custom deprives them of due

process of law and equal protection of the laws. Pet. Cert. 38–48. Plaintiffs' due process argument is based on the contention that they are entitled to be heard before their right to exclude the public from their property can be extinguished. They claim that the Oregon Supreme Court applied the *Thornton* presumption of an easement to overcome their historical and legal analysis showing the impropriety of the doctrine of custom, as applied to their property. Plaintiffs' equal protection claim is based on alleged unequal enforcement of the custom doctrine along Oregon's beaches, as well as Oregon's alleged unequal application of the doctrine to other riparian land.

1. Due Process

Plaintiffs did not argue to the Oregon Supreme Court that to apply *Thornton* to them would deprive them of procedural due process, nor did they include such a claim in their complaint. Rather, plaintiffs only argued that to apply the *Thornton* legal principle to them, inasmuch as it was first announced in that case, constituted an improper retroactive application of state law. Pet. Cert. App. H154–64.

The Oregon Supreme Court properly disposed of plaintiffs' retroactivity argument, primarily based on its conclusion that the doctrine of custom had always been part of the property law of the State of Oregon. Pet. Cert. App. A12.[9] Inasmuch as Oregon

[9] While *Thornton* may have been the first decision in Oregon expressly recognizing that property rights legally could be acquired by custom, earlier decisions, at least implied or alluded to the doctrine as a source of such rights. *See, e.g., Hume v. Rogue River Packing Co.*, 51 Or. 237, 83 P. 391, 92 P. 1065, 96 P. 865 (1908) (rejecting a custom-based claim to an exclusive fishery in the Rogue River, but recognizing the existence of the doctrine of custom).

adopted the common law,[10] which allowed easements to be obtained by custom, grant or prescription, and inasmuch as no judicial decisions or legislative acts prior to *Thornton* rejected custom as a basis for acquiring an easement, it can be fairly said that at the time *Thornton* was decided, the principle that an easement could be acquired by custom was as much a valid part of Oregon's property law as was the principle that an easement could be acquired by prescription.[11] Any person who acquired the fee title to real property did so with the knowledge — constructive or otherwise — that an easement over that person's property could be acquired by application of one or the other of these two principles.[12] Thus, *Thornton* did not announce a new principle of property law; it simply applied an existing principle to the factual situation in that case.

Plaintiffs do not press their retroactivity argument in this Court, just as they did not press their due process argument before the Oregon Supreme Court. This Court should not entertain plaintiffs' retroactivity argument, which they have abandoned, nor address their due process argument which they now raise for the first time in their petition for certiorari.

[10] *See* Or. Const., Art. XVII, § 7; *Hale v. Port of Portland*, 308 Or. 508, 513-14, 783 P.2d 506 (1989).

[11] In *Hume v. Rogue River Packing*, *supra*, 51 Or. at 253, the court listed the common law elements of prescriptive easement and then rejected the claim to an exclusive fishery based on this doctrine because Hume's prescriptive right claim did not possess the requisite adversity.

[12] This applies to federal patentees as well, inasmuch as they take title from the federal government subject to the State's property law. *See, e.g., State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977).

2. Equal Protection.

Similarly, plaintiffs presented no equal protection argument below and did not include such a claim in their complaint. Indeed, consideration of plaintiffs' equal protection argument is particularly inappropriate because it is based entirely on factual assertions that are not included in their amended complaint and are, thus, outside the record properly before this Court.[13]

B. Whether the Oregon court properly applied *Thornton* in light of *Lucas* raises no substantial federal question.

Plaintiffs' second challenge is that *Thornton*, "by *ipse dixit* [transforms] petitioners' fundamental property right of exclusive possession of the dry sand into a permanent physical occupation by the public for their unlimited recreational pleasure." Pet. Cert. 21. Plaintiffs' argument under this challenge is multi-faceted. They argue that the Oregon court's application of the doctrine to their property is "problematic" given "the historical facts affecting the land in question and Oregon's legal history." Pet. Cert. 23–30. They then argue that *Thornton* extinguishes a fundamental property right "without any prior precedent in the state backgrounding a principle of 'easement by custom,'" Pet. Cert. 33. They challenge the Oregon court's determination that the doctrine of custom was part of Oregon's property law at the time plaintiffs purchased their property. Pet. Cert. 34–36. Finally, they contend that the length of use of the dry sand as determined by the Oregon courts is not what matters under *Lucas*. Rather, what matters is whether the principle that would

[13] For example, plaintiffs refer the Court to the so-called "legislative facts" set forth at pages 22–27 of their petition. Pet. Cert. 44. There, plaintiffs mention development that has occurred on the dry sands of Oregon beaches. The Oregon Supreme Court, as a matter of State appellate practice, refused to consider these extra-record "facts." Pet. Cert. App. A5, n.8.

permit the public to acquire an easement over the dry sand existed at the time they purchased their property. Plaintiffs then declare that "[n]o one can honestly argue that such a rule backgrounded principals [*sic*] of Oregon's common law of real property prior to 1969 and *Thornton*." Pet. Cert. 37.

As discussed briefly above, plaintiffs' second question can be divided into two parts — the first of which is a state-law question and the second of which is a federal question. The state-law part of the question consists of two subparts. The first is: did the doctrine of custom form a part of the State's property law pre-*Thornton*, or did it come into existence only when *Thornton* was decided? The second subpart is: if the doctrine pre-dated *Thornton*, did the Oregon Supreme Court properly determine that the elements of the doctrine had been satisfied?

Whether the doctrine of custom was part of the State's property law pre-*Thornton*, and whether the Oregon court properly concluded that the doctrine's elements had been satisfied is a state law, not a federal law question. It is, therefore, beyond the authority of this Court to review. *Williams v. Kaiser*, 323 U.S. 471, 477 (1945). Thus, in considering plaintiffs' takings claims, this Court must take it as given that before the decision in *Thornton* and before plaintiffs had purchased their property in 1957, the public had acquired a recreational easement over the dry sand portion of Oregon's beaches.

The federal question part of plaintiffs' challenge, then, is whether, under *Lucas*, the public recreational easement constitutes (1) a limitation on the use of property that is grounded in state property law principles; or (2) a "permanent easement that was a preexisting limitation upon the landowner's title." *Lucas*, 112 S.Ct. at 2900. In either case, a restriction on or elimination of economically beneficial uses that flow from these sources does

not result in a taking of property that constitutionally must be compensated.

The Oregon Supreme Court correctly decided that the public's recreational easement over plaintiffs' property fit the *Lucas* requirements, and it therefore properly concluded that no compensation is due. Plaintiffs' arguments that the Oregon court reached the wrong result present no substantial federal question for this Court to resolve. The only question of any possible importance is whether the Oregon court's enunciation of the common law doctrine of custom in *Thornton* caught property owners along the beach so by surprise that, even though the principle was part of the State's background principles of property law, it was such an unpredictable pronouncement of state law and so defeated the reasonable expectations of property owners on the beach that its application should not fit the *Lucas* doctrine.

That question is answered by the discussion above of Oregon law. No legislative or judicial decisions had ever renounced the doctrine of custom in Oregon, the Oregon Constitution incorporated the common law as part of the law of Oregon, and at least one early Oregon case, *Hume v. Rogue River Packing Co.*, 51 Or. 237, 83 P. 391, 92 P. 1065, 96 P. 865 (1908), had recognized the existence of the doctrine in Oregon. It cannot credibly be argued that property owners were not on at least constructive notice that the doctrine formed part of Oregon's property law. *Thornton*'s articulation of the doctrine of custom as part of the State's property law legitimately cannot be claimed to work a "change in Oregon law." Indeed, plaintiffs do not try to argue that it did.

Moreover, the court in *Thornton*, based on an extensive record before it, addressed whether application of the doctrine would be unfair to owners of beach property:

> Finally, in support of custom, the record shows that the custom of the inhabitants of Oregon and of visitors in the state to use the dry sand as a public recreation area is so notorious that notice of the custom on the part of persons buying land along the shore must be presumed. . . .
>
> The rule in this case, based upon custom, is salutary in confirming a public right, and at the same time it takes from no man anything which he has had a legitimate reason to regard as exclusively his.

254 Or. at 598–99.

Plaintiffs alleged no facts in their complaint, nor have they identified even any extra-record facts, to demonstrate that application of the doctrine to them works any fundamental unfairness. Their claim that the public's recreational easement in the dry sand of Oregon's beaches, particularly in the Cannon Beach area, does not fit *Lucas*, lacks merit and is insubstantial as a federal question.

Plaintiffs identify no reason, beyond their concern with the outcome of this particular case, why the Oregon court's decision merits this Court's discretionary review. They point to no decisions that conflict with this one. They present no argument that resolving the issue in this case will assist other courts in understanding *Lucas* and the scope of its holding. The arguments that plaintiffs present here and that the Court properly may consider are, at best, of questionable merit even limited to the facts of this case. In short, plaintiffs offer nothing of federal importance that would justify this Court's grant of certiorari.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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December 23, 1993

APPENDIX A

AMENDED COMPLAINT

1.

Plaintiffs are the owners of certain lands situated in the City of Cannon Beach, Clatsop County, which are particularly described as follows:

Tax Lots 8500 and 8501, Map 51030AD for the City of Cannon Beach.

Plaintiffs are also residents of the City of Cannon Beach, Clatsop County, State of Oregon.

2.

The City of Cannon Beach (hereafter the "City") is a municipality duly organized and incorporate under the laws of the State of Oregon and is subject to suit pursuant to ORS 30.320. The City has asserted jurisdiction over all plaintiffs' land.

3.

The Department of Parks & Recreation (hereafter "Parks & Rec") is an agency of the State of Oregon and is subject to suit pursuant to ORS 30.320. This agency has asserted jurisdiction over plaintiffs' land pursuant to ORS 390.635 and ORS 390.650 et seq.

4.

At all material times, plaintiffs' property, as described in paragraph 1 of the complaint, has been identified in the local comprehensive plan of Cannon Beach as an area where development existed as of January 1, 1977, in that Tax Lots 8500 and 8501 are both vacant beachfront subdivision lots, which have been physically improved by construction of streets and provisions of utilities.

5.

At all material times, plaintiffs' property has been zoned Residential/Motel by the City of Cannon Beach.

6.

At all material times, plaintiffs' property has been one of two remaining vacant beachfront lots zoned for Residential/Motel use by the City of Cannon Beach.

7.

Plaintiffs are also owners of the Ecola Inn, a beachfront motel in Cannon Beach. Adjacent to the Ecola Inn, to the north is the Surfsands Resort Hotel, owned by Raymond Schultens, now deceased, and Steve Martin. Plaintiffs' vacant property is north of, and adjacent to, the Surfsands Resort Hotel.

8.

On or about July 20, 1979, plaintiffs leased the property described in paragraph 1 of the complaint to Raymond Schultens and Steve Martin. The parties agreed that Messrs. Schultens and Martin would build up to an additional thirty hotel units on the leased property. The lease extends for a fifty (50) year term. Under the terms of the lease, plaintiffs are entitled to lease rental proceeds based on the then current yearly assessed value of the property. Upon termination of the lease, ownership of any buildings on the property reverts to plaintiffs.

9.

On or about January 1, 1985, the Land Use Conservation & Development Commission ("LCDC") amended Goal 18 to require local governments and state and federal agencies to prohibit residential developments and commercial and industrial buildings on beaches.

10.

On or about October 8, 1986, the City of Cannon Beach implemented Goal 18 by amending Ordinance 79-4A, Section 3.180, to establish the Active Dune & Beach Overlap Zone ("ADBO Zone"). Zoning Ordinance 3.180 prohibits any residential developments or commercial or industrial buildings within the ADBO Zone.

FIRST CLAIM: AGAINST CITY

(Inverse Condemnation)

11.

Plaintiffs hereby reallege paragraphs 1 through 10 of the complaint as though fully set forth herein.

12.

Most of plaintiffs' land, as described in paragraph 1 of the complaint, falls within the Active Dune and Beach Overlap Zone ("ADBO zone") established by City Zoning Ordinance 3.180. A small easterly portion of plaintiffs' land lies outside the ADBO zone, but cannot by used for any economically viable purpose.

13.

It is the express purpose and effect of the Active Dune and Beach Overlap Zone to prohibit all residential development and commercial and industrial buildings within the zone.

14.

On or about December 18, 1989, plaintiffs applied to the City for a conditional use permit to construct a retaining wall on their property to stabilize the property for the aforesaid commercial development.

15.

The conditional use request was denied by the City Planning Commission on March 16, 1990, and, on appeal by the City Council on May 1, 1990. The City's refusal to grant plaintiffs'

request was premised upon noncompliance with Section 3.180 of the City's Zoning Ordinance (See Exhibit 1, Planning Commission Denial, p. 12 §III A, p. 13 §III C), which prohibits commercial development on the beach. Therefore, compliance with other technical objections to the proposed retaining wall *could not* result in an award of the permit.

16.

Plaintiffs have pursued all available means of relief with the City in an effort to gain some economically viable use of their land, but have been denied all such use of their land by virtue of the complete prohibition on commercial, residential and industrial building imposed by the City within the ADBO zone. So long as their prohibition remains, plaintiffs are denied all economic use of their land.

17.

Plaintiffs have no adequate legal or equitable remedy to effect repeal of said ordinance or to exempt their property from its application.

18.

The City's denial of plaintiffs' petition based upon the ADBO's prohibition of all commercial, residential and industrial building within the ADBO zone constitutes a governmental taking of private property for a public purpose, which violates Article I, Section 18 of the Oregon Constitution and the Fifth Amendment to the United States Constitution as that Amendment applies to state action via the Fourteenth Amendment to the U.S. Constitution.

19.

Plaintiffs have sought just compensation from the City of Cannon Beach but no compensation has been received.

20.

Plaintiffs are entitled to just compensation under the Oregon and United States Constitutions, as measured by the full economic value of their property at its highest and best use.

21.

Plaintiffs are entitled to costs, disbursements and reasonable attorney's fees at trial and on appeal, pursuant to ORS 20.085.

SECOND CLAIM: AGAINST CITY

(Inverse Condemnation)

Plaintiffs allege:

22.

Plaintiffs hereby reallege paragraphs 1 through 13 of the complaint, as though fully set forth herein.

23.

Cannon Beach Ordinance 79-4A, Section 3.180 violates Article I, Section 18 of the Oregon Constitution and the Fifth Amendment to the United States Constitution, as the Amendment to the United States Constitution. The ordinance, on its face, is a governmental taking of private property for a public purpose without just compensation.

24.

The City adopted this ordinance on October 8, 1986. Adoption of the ordinance has deprived plaintiffs of all economic use of their property since that date.

25.

Plaintiffs have no adequate legal or equitable remedy to effect repeal of said ordinance or to exempt their property from its application.

26.

Plaintiffs are entitled to damages equivalent to the economic value of their property, at its highest and best use, including loss

of use of the property since the unconstitutional ordinance was adopted.

27.

Plaintiffs are entitled to costs, disbursements and reasonable attorney's fees at trial and on appeal, pursuant to ORS 20.085.

THIRD CLAIM: AGAINST PARK & REC

(Inverse Condemnation)

Plaintiffs allege as follows:

28.

Plaintiffs hereby reallege paragraphs 1 through 20 of the amended complaint, as though fully set forth herein.

29.

Most of plaintiffs' property lies within the "ocean shore" as defined in ORS 390.605, et seq. over which Parks & Rec asserts complete jurisdiction and authority, pursuant to ORS 390.111, OR [*sic*] 390.620 and ORS 390.635. Parks & Rec further asserts that any "improvements" within the "ocean shore" require Parks & Rec's approval pursuant to ORS 390.640 et seq.

30.

On or about August 24, 1989, plaintiffs applied to Parks & Rec for a permit to build a retaining wall on their property to stabilize the property for commercial development.

31.

The permit request was denied by Parks & Rec on March 8, 1990. Denial of the permit was premised upon noncompliance with LCDC Goal 18 and upon plaintiffs' failure to obtain approval from the City of Cannon Beach, which has also implemented Goal 18. See Exhibit 2, Denial of Permit Request, p. 6(6), p. 9(6), p. 15(e). Therefore, compliance with other technical objections to the retaining wall, as set forth by Parks & Rec, *could not* result in an award of a permit.

32.

Plaintiffs have pursued all available means of relief with Parks & Rec in an effort to gain some economically viable use of their land, but have been denied all such use of their land by virtue of the complete prohibition on commercial, residential and industrial buildings imposed by Parks & Rec seaward of the "ocean shore" zone line. So long as this prohibition remains, plaintiffs are denied all economically viable use of their land.

33.

Parks & Rec's denial of plaintiffs' permit based upon the prohibition of Goal 18 of all commercial, residential and industrial building seaward of the "ocean shore" line constitutes a governmental taking of private property for a public purpose, which violates Article I, Section 18 of the Oregon Constitution and the Fifth Amendment to the United States Constitution as that Amendment applies to state action via the Fourteenth Amendment to the United States Constitution.

34.

Plaintiffs have sought just compensation from the State of Oregon, Department of Parks & Rec, but no compensation has been received.

35.

Plaintiffs are entitled to just compensation under the Oregon and United States Constitutions, as measured by the full economic value of their property at its highest and best use.

36.

Plaintiffs are entitled to costs, disbursements and reasonable attorney's fees at trial and on appeal, pursuant to ORS 20.085.

FOURTH CLAIM: AGAINST PARK & REC

(Inverse Condemnation)

Plaintiffs allege:

37.

Plaintiffs reallege paragraphs 1 through 35 of the complaint, as though fully set forth herein.

38.

Land Use Goal 18, as implemented by Parks & Rec, (See Exhibit 3, pp. 30–21 [*sic*] ¶2, 5) violates Article I, Section 18 of the Oregon Constitution and the Fifth Amendment to the United States Constitution, as that Amendment applies to the state action via the Fourteenth Amendment to the United States Constitution. This Land Use Goal, which has the rule of law, on its face, constitutes a governmental taking of private property for a public purpose without just compensation.

39.

The State adopted this land use goal on or about January 1, 1985. The adoption and implementation of this land use goal has deprived plaintiffs of all economically viable use of their property since that date.

40.

Plaintiffs are entitled to damages equivalent to the economic value of their property, including loss of use of the property, since the unconstitutional and [*sic*] use goal was adopted.

41.

Plaintiffs are entitled to costs, disbursements and reasonable attorney's fees at trial and on appeal, pursuant to ORS 20.085.

FIFTH CLAIM: AGAINST PARK & REC

(De Novo Review)

Plaintiffs allege:

42.

Plaintiffs reallege paragraphs 1 through 41 of the complaint, as though fully set forth herein.

43.

Plaintiffs petition this court for a de novo review of Parks & Rec's denial of plaintiffs' application for a permit to construct a retaining wall upon plaintiffs' property pursuant to ORS 390.658.

WHEREFORE, plaintiffs respectfully prays [*sic*] for judgment of this court as follows:

1. FIRST CLAIM: AGAINST CITY
   a. Damages equal to just compensation, as measured by the plaintiffs' land's economic value as its highest and best use as of the date of the City's denial of plaintiffs' conditional use permit.
   b. Costs and attorney's fees.
   c. Such other relief as the court deems just.
2. SECOND CLAIM: AGAINST CITY
   a. Damages equal to just compensation, as measured by the plaintiffs' land's economic value at its highest and best use, from October 8, 1986, the date of enactment of Ordinance 79-4A constituting a taking of private property for public purposes without compensation.
   b. Costs and attorney's fees.
   c. Such other relief as the court deems just.
3. THIRD CLAIM: AGAINST PARK & REC
   a. Damages equal to just compensation, as measured by the plaintiffs' land's economic value at its highest and best use as of March 8, 1990, the date of Parks & Rec's denial of the plaintiffs' permit application.
   b. Costs and attorney's fees.
   c. Such other relief as the court deems just.
4. FOURTH CLAIM: AGAINST PARKS & REC
   a. Damages equal to just compensation, as measured by the plaintiffs' land's economic value at its highest and best

use as of January 1, 1985, the date of enactment of Goal 18, constituting a taking of private property for public purposes with compensation.

b. Costs and attorney's fees.

c. Such other relief as the court deems just.

4. FIFTH CLAIM: AGAINST PARKS & REC

a. Following de novo review, a judgment for damages, costs and attorney's fees and such other relief as the court deems just as prayed for in the Third and Fourth Claims.